

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 99-0200

Use Tax

For Tax Years 1995 through 1997

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ISSUES

I. Use Tax—Aircraft

Authority: IC 6-2.5-1-6; IC 6-2.5-3-2; IC 6-2.5-5-8; IC 6-8.1-5-4; 45 IAC 2.2-3-6

Taxpayer protests imposition of use tax on three aircraft.

II. Tax Administration—Negligence Penalty and Interest

Authority: 45 IAC 15-11-2; IC 6-8.1-5-4

Taxpayer protests imposition of a ten percent (10%) negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer operates an aircraft dealership. As the result of an audit for the tax years in question, the Department of Revenue ("Department") issued proposed use tax assessments. Taxpayer protests that the aircraft were not used in Indiana and are therefore not subject to use tax.

I. Use Tax—Aircraft

Taxpayer protests the imposition of use tax on three aircraft. The Department issued the proposed assessments pursuant to IC 6-8.1-5-1(a), which states in relevant part:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available.

Also of relevance is IC 6-2.5-3-2(b), which states:

The use tax is also imposed on the storage, use, or consumption of a vehicle, an aircraft, or a watercraft, if the vehicle, aircraft, or watercraft:

- (1) is acquired in a transaction that is an isolated or occasional sale; and
- (2) is required to be titled, licensed, or registered by this state for use in Indiana

At the time of the audit, the Department was unable to verify the manner of use of the aircraft, and so used the best information available to determine proposed use tax assessments. Taxpayer protests that the aircraft do not meet the requirements of IC 6-2.5-3-2(b).

45 IAC 2.2-3-6 provides additional guidance concerning use tax on aircraft. That regulation states in relevant parts:

(b) For the purpose of the state gross retail and use tax:

- (1) The sale of aircraft by any person licensed as an aircraft dealer in Indiana has been, and will continue to be, a retail sale. Transactions representing isolated or occasional sales of aircraft required to be licensed by the state for use in Indiana shall constitute retail transactions under the provisions of this section. Every sale by a resident or nonresident person who is not a retail merchant as defined in the Indiana gross retail tax act [IC 6-2.5] of an aircraft required to be licensed by the state for use in Indiana shall be deemed a retail transaction, and the use of such aircraft shall be subject to the use tax which shall be paid by the purchaser to the aeronautics division of the department of transportation at the time of the licensing of the aircraft by the purchaser.

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(c)(1) Persons licensed as aircraft dealers in Indiana will collect sales tax on their sales of aircraft and will record the selling price of the aircraft and the amount of sales tax collected on sales tax form ST-108AC. Form ST-108AC will be used by the purchaser as proof of payment of sales tax when registering the aircraft in Indiana. If the aircraft is purchased from any person other than an aircraft dealer licensed in Indiana, the purchaser must pay all sales or use tax due to the aeronautics division of the department of transportation at the time the aircraft is first registered in Indiana by the purchaser.

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(d)(1) If the aircraft has been registered previously in Indiana, the seller must assign certificate of ownership to the purchaser showing the selling price, trade-in, description, and price. If the aircraft has not been previously registered in Indiana, the seller must furnish a bill of sale, signed by the seller, showing the make, model, year, selling price, and trade-in on the aircraft. At the time of registration, the purchaser must furnish the aeronautics division of the department of transportation with either the properly assigned certificate of ownership or bill of sale.

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- (e) Only the trade-in value of an aircraft for another aircraft, or the trade-in value of a watercraft for another watercraft, may be deducted from the selling price for sales tax purposes.
- (f) Aircraft which are purchased to be taken immediately to another state for registration in that state, and not for registration or use in Indiana, are not subject to the Indiana sales tax. The purchaser must furnish the seller with exemption certificate ST-136AC, in triplicate. The seller is required to keep one copy for his files. Two copies of the exemption certificate must be certified by the dealer and forwarded to the sales tax division of the Indiana department of revenue.

Taxpayer states that the three aircraft were not used in Indiana. Taxpayer has provided sufficient documentation to establish that one aircraft, Plane #1, was traded in a like-kind exchange. IC 6-2.5-1-6 provides:

- (a) "Like kind exchange" means the reciprocal exchange of personal property between two (2) persons, when:
 - (1) the property exchanged is of the same kind or character, regardless of grade or quality; and
 - (2) the persons exchanging the property both own the property prior to the exchange.
- (b) A "like kind exchange" may be a part of a transaction involving additional consideration other than the exchanged property.
- (c) Notwithstanding subsection (a), a "like kind exchange" does not occur when:
 - (1) the transaction involves more than two (2) persons; or
 - (2) one (1) party to the transaction, through agreement or negotiating with the second party, acquires personal property for the primary purpose of exchanging that property for like kind property held by the second party.

In the course of this protest, taxpayer provided documentation showing that Plane #1 was traded for another of the same make, for an equal price. As explained in 45 IAC 2.2-3-6(e), the trade in value of an aircraft may be deducted from the selling price of another aircraft. In this case, the aircraft were of equal value, therefore the sales tax due on Plane #1 was zero and the use tax due is zero.

Taxpayer has provided an ST-108AC form establishing that another aircraft, Plane #2, was sold to a customer for resale. IC 6-2.5-5-8 provides in relevant part:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property.

Since taxpayer purchased the aircraft for resale, under IC 6-2.5-5-8 it is not subject to use tax.

In its protest, taxpayer explained that the third aircraft, Plane #3, was purchased in Tennessee and shipped to Illinois for repairs and refurbishment, where it remained throughout the audit period. IC 6-2.5-3-2(a) provides:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

While taxpayer has provided sufficient documentation to establish that the aircraft was purchased in Tennessee, it has not provided documentation establishing that the aircraft remained outside of Indiana. Taxpayer protests that it could not provide the documentation requested by the auditor due to Federal Aviation Administration regulations that required logbooks to stay with the aircraft in Illinois. While the F.A.A. regulations cited by taxpayer may or may not require the logbook to remain with the aircraft at all times, and notwithstanding the fact that the Department would have accepted copies of the logbook entries, there are other ways to document the location of an aircraft. Taxpayer has provided none of these. IC 6-8.1-5-4 places the burden of proving proposed assessments incorrect on the taxpayer. Taxpayer has not provided sufficient documentation to meet that burden.

In conclusion, taxpayer has met its burden of proving the proposed assessments incorrect with regard to Plane #1 and Plane #2. Taxpayer has not met its burden with regard to Plane #3. Therefore, the proposed use tax assessment will not apply to Plane #1 and Plane #2, but will apply to Plane #3.

FINDING

Taxpayer's protest is sustained in regard to Planes #1 and #2 and denied with regard to the Plane #3.

II. Tax Administration—Negligence Penalty

Taxpayer protests the imposition of a ten percent (10%) negligence penalty. Taxpayer requests that all penalties be waived as it has acted in good faith at all times, and any remaining assessments are not the result of any fraud, willful disregard of Indiana's tax laws, or negligence on the part of taxpayer. Negligence is defined by 45 IAC 15-11-2(b), which states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall

be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) states in part:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-2.1] if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

Also of relevance is IC 6-8.1-5-4, which states:

- (a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.
 - (b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:
 - (1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or
 - (2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular liability was due, unless after an audit, the department consents to earlier destruction.
- In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.
- (c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.
 - (d) A person must, on request by the department, furnish a copy of any federal returns that he has filed.

While taxpayer was able to produce documentation to show that two of the aircraft in question were not subject to use tax, taxpayer has not provided such documentation for the third aircraft. All of this documentation should have been available for the Department's review at the time of the audit. Not having the records available at the time of the audit is a violation of IC 6-8.1-5-4, and is treated as negligence under 45 IAC 15-11-2(b).

FINDING

Taxpayer's protest is denied.